



## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 217**

**[Docket No. 220407-0086]**

**RIN 0648-BJ87**

### **Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Lighthouse Repair and Tour Operations at Northwest Seal Rock, California**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule; notification of issuance.

**SUMMARY:** NMFS Office of Protected Resources, upon request from the St. George Reef Lighthouse Preservation Society (Society), hereby issues regulations to govern the unintentional taking of marine mammals incidental to conducting aircraft operations, lighthouse renovation, light maintenance activities, and tour operations on the St. George Reef Lighthouse Station (Station) on Northwest Seal Rock (NWSR) over the course of five years (2022-2027). These regulations, which allow for the issuance of Letters of Authorization (LOA) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking. We are also issuing a Letter of Authorization to cover the first year of these activities.

**DATES:** Effective from May 15, 2022 through May 14, 2027.

**FOR FURTHER INFORMATION CONTACT:** Amy Fowler, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. In case of problems accessing these documents, please call the contact listed above.

**SUPPLEMENTARY INFORMATION:**

**Purpose and Need for Regulatory Action**

This final rule establishes a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take of marine mammals incidental to the Society conducting aircraft operations, lighthouse renovation, light maintenance activities, and tour operations on the Station on NWSR approximately 8 miles (12.9 km) northwest of Crescent City, CA.

We received an application from the Society requesting 5-year regulations and authorization to take multiple species of marine mammals. Take would occur by Level B harassment incidental to acoustic and visual disturbance of pinnipeds during helicopter operations, lighthouse repair, and tour operations. Please see **Background** section below for definitions of harassment.

*Legal Authority for the Proposed Action*

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region for up to 5 years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the “least practicable adverse impact” on the affected species or stocks

and their habitat (see the discussion below in the **Mitigation** section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this rule containing 5-year regulations, and for any subsequent Letters of Authorization (LOAs). As directed by this legal authority, this rule contains mitigation, monitoring, and reporting requirements.

#### *Summary of Major Provisions within the Regulations in this Final Rule*

Following is a summary of the major provisions of the regulations in this final rule regarding the Society's activities. These measures include:

- Required implementation of mitigation to minimize impact to pinnipeds and avoid disruption to dependent pups, including several measures to approach haulouts cautiously to minimize disturbance, especially when pups are present.
- Required monitoring of the project areas to detect and record the presence of marine mammals before initiating work.

#### **Background**

The MMPA prohibits the "take" of marine mammals, with certain exceptions. Sections 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made, regulations are issued, and notice is provided to the public.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence

uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as “mitigation”); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

NMFS has defined “negligible impact” in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term “take” means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.

Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

### **Summary of Request**

On March 23, 2020, NMFS received a request from the Society for a proposed rule and LOAs to take marine mammals incidental to lighthouse maintenance and preservation activities at NWSR, offshore of Crescent City, CA. The application was deemed adequate and complete on April 16, 2020. The Society’s request is for take of a small number of California sea lions (*Zalophus californianus*), harbor seals (*Phoca vitulina*), Steller sea lions (*Eumetopias jubatus*), and northern fur seals (*Callorhinus*

*ursinus*) by Level B harassment only. Neither the Society nor NMFS expects serious injury or mortality to result from this activity. On June 9, 2020 (85 FR 35268), we published a notice of receipt of the Society's application in the **Federal Register**, requesting comments and information related to the request for 30 days. We received no comments. After publication of the notice of receipt, the Society reevaluated their application and decided to seek changes to their deed restriction, so requested that this action be paused. Revised applications were submitted on September 2, 2020, December 9, 2020, and a final revised application was submitted on August 6, 2021, which was deemed adequate and complete. On September 8, 2021 NMFS issued a proposed rule in the Federal Register (86 FR 50304) soliciting public comments for 30 days. All public comments were considered in developing this final rule, and are discussed below in the **Comments and Responses** section.

NMFS previously issued nine 1-year Incidental Harassment Authorizations (IHAs) for similar work (75 FR 4774, January 29, 2010; 76 FR 10564, February 25, 2011; 77 FR 8811, February 15, 2012; 78 FR 71576, November 29, 2013; 79 FR 6179, February 3, 2014; 81 FR 9440, February 25, 2016; 82 FR 11005, February 17, 2017; 83 FR 19254, May 2, 2018; and 84 FR 15598, April 16, 2019). Generally speaking, the Society complied with the requirements (*e.g.*, mitigation, monitoring, and reporting) of the previous IHAs. However, misunderstandings in past implementation have resulted in missing or incorrectly recorded monitoring data, which compelled NMFS to require more frequent reporting in the first year (at least) of this rule to ensure appropriate monitoring and reporting implementation in the future. Information regarding their monitoring results may be found in the **Potential Effects of Specified Activities on Marine Mammals and their Habitat** and **Estimated Take** sections.

### **Comments and Responses**

We received comments from 5 private citizens on the proposed rule.

*Comment:* Three of the comments were from students who largely summarized various aspects of the incidental take authorization process and support issuance of the incidental take authorization. Ryan Kowalski comments that “the proposed rule is justified and properly authorized.” Chelsea Rasmussen agrees with this proposed rule and notes the extensive citations and prior authorizations and suggests the data shows “a limited potential for the requested work to cause any kind of long term disturbance of the present species of marine mammal.” Negative effects of not allowing the project to go forward are also discussed. Benjamin Short believes the Society “should be able to carry out their maintenance tasks to the lighthouse” since the Society has “done its due diligence to negate any adverse impact their work will have on the pinnipeds present.” He points to “a clear and concise mitigation plan” and “very comprehensive monitoring and reporting measures.”

*Response:* NMFS appreciates the commenters’ thoughtful responses.

*Comment:* Jean Public commented that the seals were at the site first and the authorization should not be issued.

*Response:* NMFS appreciates this comment. However, the MMPA does not permit us to deny an incidental harassment authorization because a species existed in a location before a proposed activity. As described herein, the requirements for issuance of MMPA incidental take regulations for this activity have been satisfied.

*Comment:* Tarin Schalow also disagrees “with the decision to grant a 5-year authorization to the Society.” The commenter is concerned the potential shift to year-round activity “on a more consistent basis may have more than a negligible impact on the pinnipeds.” The adaptive management provisions are acknowledged, but the commenter argues for unspecified additional protections “in case the pinniped stock of the area does become impacted more than a negligibly.” The commenter is also concerned about the “misunderstandings in past implementation” of the Society’s prior IHAs and argues we

should not grant a five-year authorization until the Society is able to demonstrate proper implementation and adherence to requirements.

*Response:* We appreciate this comment but disagree that year-round activity may have more than a negligible impact on the marine mammals. We analyzed the effects of allowing year-round activity in the proposed rule, and the commenter provides no new information to revise that analysis. As the commenter notes, the proposed authorization includes an adaptive management provision that would allow us to modify the terms and conditions of the authorization should new information come to light on the effect of the activity on marine mammals. In addition, we note we regularly authorize year-round construction and other activities in the region that also do not cause more than negligible impacts on pinnipeds. We also note that, at this time, the Society has been unable to modify the terms of their deed, so the current work window restrictions of the deed will remain in place for the time being.

We share the commenter's concerns about the "misunderstandings in past implementation" of the Society prior IHAs. This is why we have initially increased the frequency of reporting for the Society to quarterly instead of our more typical yearly reporting requirement. This is also why the initial LOA we are issuing is only valid for 1-year, rather than for the entirety of the possible 5 years. We have also been engaged in more extensive than normal planning with the Society with regards to their monitoring and reporting plans and preparations before issuing this final rule and initial LOA to ensure that implementation and compliance will be successful. We will reevaluate the Society's implementation and compliance in accordance with the terms of this final rule and the one-year LOA before issuing additional LOAs.

### **Changes from Proposed to Final Rule**

The duration of effectiveness for the regulations in this final rule is five years, as envisioned in the proposed rule, although this final rule is effective from May 15, 2022,

through May 14, 2027, rather than from 2021-2026, as generally envisioned in the proposed rule. Additionally, NMFS has removed a mitigation requirement from the proposed rule that required the door to the lower platform of the lighthouse station to remain closed at all times. This requirement was not practicable for the Society, as the open door is the only source of light in the lower room of the station, and the daylight is necessary for work crews to conduct their restoration activities. NMFS has also specified the amount of time that the Society must monitor for marine mammals, and the location from which the Society must monitor, before and after each helicopter takeoff and landing. Finally, NMFS has clarified the required assessment of behavioral responses that the Society must include in their monitoring report(s) to eliminate irrelevant behaviors.

### **Description of Specified Activity**

#### *Overview*

The St. George Reef Lighthouse Station was built on NWSR in 1892 and is listed in the National Register of Historic Places. Covering much of the islet's surface, the structure consists of a 14.5 meter (m) high (48 foot (ft)) oval-shaped concrete base (the caisson) that holds much of the equipment and infrastructure for the lighthouse tower, which sits on the top of one end of the base. The square tower consists of hundreds of granite blocks topped with a cast iron lantern room reaching 45.7 m (150 ft) above sea level. An observation gallery platform surrounds the lantern room and provides a 360-degree view to the caisson and rocks below.

The purpose of the project is to conduct annual maintenance of the Station's optical light system, emergency maintenance in the event of equipment failure, restoration activities, and lighthouse tours. Because NWSR has no safe landing area for boats, the Society accesses the Station via helicopter. Restoration work sessions can occur over 3-day weekends or longer one to two week sessions. The following specific aspects of the proposed activities would likely result in the take of marine mammals:



acoustic and visual stimuli from (1) helicopter landings and takeoffs; (2) noise generated during restoration activities (*e.g.*, painting, plastering, welding, and glazing); (3) maintenance activities (*e.g.*, bulb replacement and automation of the light system); and (4) human presence. Thus, NMFS anticipates these activities may occasionally cause behavioral disturbance (*i.e.*, Level B harassment) of four pinniped species. It is expected that the disturbance to pinnipeds from the activities will be minimal and will be limited to Level B harassment.

The regulations issued here (and any issued LOAs) replace annual IHAs, providing a reduction in the time and effort necessary to obtain individual incidental take authorizations.

#### *Dates and Duration*

The Society proposes to conduct the activities (aircraft operations, lighthouse restoration and maintenance activities, and public tours) with a maximum of 70 helicopter flight days per year. The Society's deed restricts normal access from June 1 through October 15 annually, so currently proposed trips under this application would occur from October 16 through May 31. However, the Society is attempting to have the deed revised to allow visits at any time of the year. Therefore we have considered the implications of possible visits during any month of the year in our analyses below and we could issue LOAs to cover this time of year should the society be successful in revising their deed. The regulations in this final rule are valid for a period of 5 years (May 15, 2022 through May 14, 2027). Over the course of this 5-year authorization, the Society proposes a maximum of 350 days of activities.

#### *Specific Geographic Region*

The Station is located on NWSR, a small, rocky islet (41°50'24" N, 124°22'06" W), approximately 9 kilometers (km) (6.0 miles (mi)) offshore of Crescent City,

California (41°46'48" N; 124°14'11" W). NWSR is approximately 91.4 meters (m) (300 feet (ft)) in diameter and peaks at 5.18 m (17 ft) above mean sea level.

#### *Detailed Description of Specific Activity*

A detailed description of the Society's planned activities was provided in our proposed rule (86 FR 50304; September 8, 2021) and is not repeated here. No changes have been made to the specified activities described therein.

#### **Description of Marine Mammals in the Area of Specified Activities**

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SARs; <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>) and more general information about these species (e.g., physical and behavioral descriptions) may be found on NMFS's website (<https://www.fisheries.noaa.gov/find-species>).

Table 1 lists all species or stocks for which take is expected and authorized for this action, and summarizes information related to the population or stock, including regulatory status under the MMPA and the Endangered Species Act (ESA) and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2020). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS's SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Pacific Marine Mammal SARs (*e.g.*, Carretta *et al.* 2020). All values presented in Table 1 are the most recent available at the time of publication and are available in the 2020 SARs (Carretta *et al.* 2020) (available online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports>).

**Table 1. Species That Spatially Co-Occur With the Activity to the Degree That Take Is Reasonably Likely To Occur**

Common name	Scientific name	Stock	ESA/MMPA status; Strategic (Y/N) <sup>1</sup>	Stock abundance (CV, N <sub>min</sub> , most recent abundance survey) <sup>2</sup>	PBR	Annual M/SI <sup>3</sup>
Order Carnivora – Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions)						
California sea lion	<i>Zalophus californianus</i>	U.S.	-, -, N	257,606 (N/A, 233,515, 2014)	14,011	>320
Northern fur seal	<i>Callorhinus ursinus</i>	California Breeding	-, D, N	14,050 (N/A, 7,524, 2013)	451	1.8
Steller sea lion	<i>Eumetopias jubatus</i>	Eastern U.S.	-, -, N	43,201 a (see SAR, 43,201, 2017)	2,592	113
Family Phocidae (earless seals)						
Pacific harbor seal	<i>Phoca vitulina richardii</i>	California	-, -, N	30,968 (N/A, 27,348, 2012)	1,641	43

1 - Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

2- NMFS marine mammal stock assessment reports online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports>, CV is coefficient of variation; Nmin is the minimum estimate of stock abundance.

3 - These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.*, commercial fisheries, ship strike). Annual Mortality/Serious Injury (M/SI) often cannot be determined precisely and in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

As indicated above, all four species (with four managed stocks) in Table 1 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have authorized it. All species that could potentially occur in the proposed survey areas are included in Table 1. Detailed descriptions of these species were provided in our notice of proposed rulemaking (86 FR 50304; September 8, 2021) and are not repeated here. No new information is available.

### **Potential Effects of Specified Activities on Marine Mammals and their Habitat**

We provided discussion of the potential effects of the specified activity on marine mammals and their habitat in our **Federal Register** notice of proposed rulemaking (86 FR 50304; September 8, 2021) and it is not repeated here. The proposed rule included a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The **Estimated Take** section later in this final rule includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The **Negligible Impact Analysis and Determination** section considers the content of the **Negligible Impact Analysis and Determination** section and the material it references, the **Estimated Take** section, and the **Mitigation** section to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

### **Estimated Take**

This section provides an estimate of the number of incidental takes authorized through this rulemaking, which informs both NMFS' consideration of "small numbers" and the negligible impact determinations.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines "harassment" as: any act of pursuit, torment, or annoyance which (i) has the

potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to helicopter operations and lighthouse maintenance activities. Based on the nature of the activity, Level A harassment is neither anticipated nor authorized.

As discussed earlier, behavioral (Level B) harassment is limited to movement and flushing, defined by the disturbance scale of pinniped responses to in-air sources to determine take (Table 2). Furthermore, no mortality is anticipated or authorized for this activity. Below we describe how the take is estimated.

#### *Marine Mammal Occurrence*

In this section we provide the information about the presence, density, or group dynamics of marine mammals that inform the take calculations.

**Table 2. Disturbance Scale of Pinniped Responses to In-Air Sources to Determine Take**

Level	Type of response	Definition
1	Alert	Seal head orientation or brief movement in response to disturbance, which may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, changing from a lying to a sitting position, or brief movement of less than twice the animal's body length.
2*	Movement	Movements in response to the source of disturbance, ranging from short withdrawals at least twice the animal's body length to longer retreats over the beach, or if already moving a change of direction of greater than 90 degrees.
3*	Flush	All retreats (flushes) to the water.

\* Only Levels 2 and 3 are considered take, whereas Level 1 is not.

The Society's monitoring efforts reported zero marine mammals present on NWSR, in 2010. Furthermore, operations were not conducted in the years 2013 through

2016; thus, monitoring was not conducted. No visits occurred in 2020. Visits have occurred in all other years since 2010.

Steller sea lions were first reported during restoration trips conducted in April (9) and November (350, with a maximum of 155/day) of 2011 (St. George Reef Lighthouse Preservation Society (SGRLPS) 2011). Zero observations of Steller sea lions were reported during the one 2012 restoration trip and three 2017 trips conducted (SGRLPS 2012, 2018). Four trips were conducted in 2018 (February, March, April, and November); only the November session reported any individuals (three) on site (SGRLPS 2018). One restoration trip was conducted in November 2019 and had 22 Steller sea lions present (SGRLPS 2020). In the event of an emergency trip to the lighthouse for repairs in summer, or if deed restrictions are changed, more Steller sea lions may be present in June and July (up to 350-400 animals based on CCR (2001)).

The maximum number of California sea lions present per day (160) was observed during the November 2011 trip. The April and November 2011 trip maximums were 2 and 430 individuals, respectively (SGRLPS 2011). Zero California sea lions were reported during the March 2012 trip (SGRLPS 2012). In 2017, the Society reported 16 and zero California sea lions during March and April trips, and 16 during a November trip for a landing zone inspection (SGRLPS 2017). Observations for the 2018 season totaled 40 individuals among its four trips (SGRLPS 2018). Eighteen California sea lions were reported during the November 2019 trip with a maximum of 10 per day (SGRLPS 2020). Should deed restrictions be altered to allow access during summer months, numbers could be somewhat higher based on the data in CCR (2001).

Northern fur seals have not been observed during any of the Society's work from 2010 through 2019 (SGRLPS 2010; 2011; 2012; 2017; 2018; 2020).

The Society first reported 2 Pacific harbor seals on site during the March 2012 restoration trip (SGRLPS 2012). Zero harbor seals were reported during the 2017, 2018, or 2019 work seasons (SGRLPS 2017; 2018; 2020).

#### *Take Calculation and Estimation*

Here we describe how the information provided above is brought together to produce a quantitative take estimate. The monitoring observations described above serve as the underpinnings of the take estimate calculation used to determine the actual number of marine mammals that may be subject to take. Take estimates for each species for which take would be authorized were based on the following equation:

$$\text{Take estimate per species} = \text{maximum number of observations/day during prior monitoring} * \text{number of proposed operations days}$$

Based on the Society's previous monitoring reports, the maximum number of observations per day for each species is: Steller sea lions 155, California sea lions 160, and Pacific harbor seals 2. No Northern fur seals have been seen in prior project monitoring but one was observed during the survey work for this project by CCR (2001), so we use one for these calculations.

As discussed above, The Society is proposing no more than 70 flight days per year. This is an optimistic estimate that far exceeds prior efforts, but given adequate funding there is the need for extensive restoration work to the Station so the Society requested consideration of the additional days of work in the take estimate. Therefore NMFS estimates that approximately 10,850 Steller sea lions (calculated by multiplying the maximum single-day count of Steller sea lions that could be present (155) by 70 days of activities), 11,200 California sea lions, 140 Pacific harbor seals, and 70 Northern fur seals could be potentially taken by Level B behavioral harassment annually over the course of this rulemaking (Table 3). NMFS bases these estimates of the numbers of marine mammals that might be affected on consideration of the number of marine

mammals that could be on NWSR in a worst case scenario based on prior monitoring, and the assumption that all animals present may exhibit behavioral responses that are considered take (Levels 2 and 3 as described in Table 2). Should deed restrictions be altered to allow access during summer months, numbers of California sea lions and Steller’s sea lions could be somewhat higher during a couple of those months based on the data in CCR (2001). Given these increases are limited in duration, only a fraction of the potential flight days could occur in summer, and the conservative nature of the maximum daily counts relative to the average observed animal counts from prior monitoring discussed above, we believe the take estimates are adequately precautionary.

**Table 3. Annual Level B Harassment Take Calculations and Percentage of Each Stock Affected**

Species	Maximum Number per Day	Days of Proposed Activity	Take	Percent of Stock
California sea lion	160	70	11,200	4.3
Steller sea lion	155	70	10,580	25.1
Pacific harbor seal	2	70	140	0.5
Northern fur seal	1	70	70	0.5

## **Mitigation**

In order to promulgate regulations and issue LOAs under Section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS does not have a regulatory definition for “least practicable adverse impact.” NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of



conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost and impact on operations.

The mitigation strategies described below largely follow those required and successfully implemented under previous incidental take authorizations issued in association with this project.

Following are the mitigation measures:

- No more than six flight days (up to two work trips) per month;
- Avoid direct physical interaction with marine mammals during activity. If a marine mammal comes within 10 m of such activity, operations must cease until the animal leaves of its own accord;
- Conduct training between construction supervisors and crews and tourists and the marine mammal monitoring team and relevant Society staff prior to the start of all visits and when new personnel join the work, so that responsibilities, communication procedures, monitoring protocols, and

operational procedures are clearly understood. Visitors to the Station must be instructed to avoid unnecessary noise and not expose themselves visually to pinnipeds around the base of the lighthouse;

- Halt loud outside activity upon observation on NWSR of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met;
- Ensure that helicopter approach patterns to the NWSR are such that the timing and techniques are least disturbing to marine mammals. To the extent possible, the helicopter must approach NWSR when the tide is too high for marine mammals to haul out on NWSR. Avoid rapid and direct approaches by the helicopter to the station by approaching NWSR at a relatively high altitude (*e.g.*, 800- 1,000 ft; 244 - 305 m). Before the final approach, the helicopter must circle lower, and approach from an area where the density of pinnipeds is the lowest. If for any safety reasons (*e.g.*, wind conditions or visibility) such helicopter approach and timing techniques cannot be achieved, the Society must abort the restoration and maintenance session for the day;
- Employ a protected species observer (PSO) and establish monitoring locations as described in the application and Section 5 of any LOA. The Holder must monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions. For all helicopter flights at least one PSO must be used; and
- Monitoring must take place for all take-offs and landings.

Based on our evaluation of the applicant's measures, as well as other measures considered by NMFS, NMFS has determined that the mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their

habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

### **Monitoring and Reporting**

In order to issue an LOA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.*, presence, abundance, distribution, density).
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.*, source characterization, propagation, ambient noise); (2) affected species (*e.g.*, life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.*, age, calving or feeding areas).
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors.

- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks.
- Effects on marine mammal habitat (*e.g.*, marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat).
- Mitigation and monitoring effectiveness.

### *Visual Monitoring*

- Monitoring during each helicopter takeoff and landing must be conducted by qualified, NMFS-approved PSOs, in accordance with the following: PSOs must be independent and have no other assigned tasks during monitoring periods. At least one PSO must have prior experience performing the duties of a PSO. Other PSOs may substitute other relevant experience, education (degree in biological science or related field), or training. PSOs resumes must be approved by NMFS prior to beginning any activity subject to these regulations.
- PSOs must record all observations of marine mammals as described in Section 5 of any LOA, regardless of distance from the activity. PSOs must document any behavioral reactions in concert with distance from the activity, according to the levels of response described in Table 2.

PSOs must have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior;
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary;
- The Society must establish the following monitoring locations. For the first flight of the day a PSO with high definition camera must be on the first flight to the station. For 15 minutes before and after all other takeoffs and landings a PSO must be stationed on the platform of the lantern room gallery, and a PSO must be on the last departing helicopter of the day;
- Aerial photo coverage of the island must be completed by an observer using a high definition camera. Photographs of all marine mammals hauled out on the island must be taken at an altitude greater than 300 meters. Photographs of marine mammals present at the last flight of the day must be taken from the helicopter or from the lantern room gallery platform just before the last flight; and
- The Society and/or its designees must forward the photographs to a biologist capable of discerning marine mammal species if one is not present on the trip. The Society must provide the data to NMFS in the form of a report with a data table, any other significant observations related to marine mammals, and a report of restoration activities. The Society must make available the original photographs to NMFS or to other marine mammal experts for inspection and further analysis.

## *Reporting*

A draft marine mammal monitoring report must be submitted to NMFS within 90 days after the completion of each activity period, or 60 days prior to a requested date of issuance of any future LOAs for projects at the same location, whichever comes first. For the first year of the activities, at least, the reports must be submitted quarterly; following submission of the first three quarterly reports, NMFS will evaluate whether it is appropriate to modify subsequent annual LOAs to require annual reports, based on whether the information provided in the first three quarterly reports adequately complies with the requirement. The report must include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets.

Specifically, the report must include:

- Dates and times (begin and end) of all marine mammal monitoring.
- Activities occurring during each daily observation period.
- PSO locations during marine mammal monitoring.
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance.
- Upon each flight, the following information must be reported: Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; time of sighting; identification of the animal(s) (*e.g.*, genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; distance and bearing of the nearest marine mammal observed relative to the activity for each flight; estimated number of animals (min/max/best estimate); estimated

number of animals by cohort (adults, juveniles, neonates, group composition, etc.); animal's closest point of approach to activity; and description of any marine mammal behavioral observations (e.g., observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (e.g., no response or changes in behavioral state such as ceasing feeding, changing direction, flushing) using pinniped disturbance scale (Table 2).

- Number of marine mammals detected, by species.
- Detailed information about any implementation of any mitigation triggered, a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

If no comments are received from NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

#### *Reporting Injured or Dead Marine Mammals*

In the event that personnel involved in the activities discover an injured or dead marine mammal, the LOA-holder must report the incident to the Office of Protected Resources (OPR) (*PR.ITP.MonitoringReports@noaa.gov*), NMFS and to West Coast Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, the Society must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA and regulations. The LOA-holder must not resume their activities until notified by NMFS. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

### **Negligible Impact Analysis and Determination**

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be “taken” through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.*, intensity, duration), the context of any responses (*e.g.*, critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS’s implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.*, as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

Activities associated with the restoration, light maintenance and tour projects, as described previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment



(behavioral disturbance) from in-air sounds and visual disturbance. Potential takes could occur if individual marine mammals are present nearby when activity is happening.

No serious injury or mortality would be expected even in the absence of the mitigation measures. For all species, no Level A harassment is anticipated given the nature of the activities, *i.e.*, much of the anticipated activity would involve noises below thresholds and visual disturbance from tens of meters away, and measures designed to minimize the possibility of injury. The potential for injury is small for pinnipeds, and is expected to be essentially eliminated through implementation of the planned mitigation measures.

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as alerts or movements away from the lighthouse structure. Most likely, individuals will simply move away from the sound source and be temporarily displaced from the areas.

Reporting from prior years of these activities has similarly reported no apparently consequential behavioral reactions or long-term effects on marine mammal populations as noted above. Repeated exposures of individuals to relatively low levels of sound and visual disturbance outside of preferred habitat areas are unlikely to significantly disrupt critical behaviors. Thus, even repeated Level B harassment of some small subset of the overall stock is unlikely to result in any significant realized decrease in viability for the affected individuals, and thus would not result in any adverse impact to the stock as a whole. Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein and, if sound and visual disturbance produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activity is occurring.

In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only minor, short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized.
- No Level A harassment is anticipated or authorized.
- No important biologically important areas have been identified within the project area.
- For all species, NWSR is a very small and peripheral part of their range.
- Monitoring reports from prior activities at the site have documented little to no effect on individuals of the same species impacted by the specified activities.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from the activity will have a negligible impact on all affected marine mammal species or stocks.

### **Small Numbers**

As noted above, only small numbers of incidental take may be authorized under Sections 101(a)(5)(A) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most

appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The amount of take NMFS authorizes is below one third of the estimated stock abundance of all species (in fact, take of individuals is less than 10 percent of the abundance of all of the affected stocks except Steller sea lions, see Table 3). This is likely a conservative estimate because they assume all takes are of different individual animals which is likely not the case, especially within individual trips. Many individuals seen within a single multi-day trip are likely to be the same across consecutive days, but PSOs would count them as separate takes across days.

Based on the analysis contained herein of the activity (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

### **Unmitigable Adverse Impact Analysis and Determination**

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

### **Adaptive Management**

The regulations in this final rule governing the take of marine mammals incidental to Society lighthouse repair and tour operation activities contain an adaptive management component.

The reporting requirements associated with this final rule are designed to provide NMFS with monitoring data from the prior year(s) to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from the Society regarding practicability) on an annual basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable. Additionally, monitoring or reporting measures may be modified if appropriate and, in this case, the rule specifies quarterly monitoring and reporting requirements for the first year, which may subsequently be modified to annual requirements, based on NMFS evaluation of the first three reports.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

### **National Environmental Policy Act**

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (*i.e.*, the issuance of a rule and subsequent LOAs) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 of the Companion Manual for NAO 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human

environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the rule qualifies to be categorically excluded from further NEPA review.

### **Endangered Species Act (ESA)**

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of incidental take authorizations, NMFS consults internally whenever we propose to authorize take for endangered or threatened species, in this case with the West Coast Regional Protected Resources Division Office.

No incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

### **Classification**

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this final rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule would not have a significant economic impact on a substantial number of small entities. The Society, a 501(c)(3) non-profit whose mission is to preserve the St. George Reef lighthouse, is the sole entity that would be subject to the requirements in these regulations, and the Society is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory

flexibility analysis is not required and none has been prepared.

This final rule contains a collection-of-information requirement subject to the provisions of the Paperwork Reduction Act. These requirements have been approved by OMB under control number 0648-0151 and include applications for regulations, subsequent LOAs, and reports.

**List of Subjects in 50 CFR Part 217**

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: April 11, 2022.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs,*

*National Marine Fisheries Service.*

For reasons set forth in the preamble, 50 CFR part 217 is amended as follows:

**PART 217 – REGULATIONS GOVERNING THE TAKE OF MARINE  
MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES**

1. The authority citation for part 217 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*

2. Add subpart F to part 217 to read as follows:

**Subpart F – Taking Marine Mammals Incidental to Lighthouse Repair and Tour**

**Operations at Northwest Seal Rock, California**

Sec.

217.50 Specified activity and specified geographical region.

217.51 Effective dates.

217.52 Permissible methods of taking.

217.53 Prohibitions.

217.54 Mitigation requirements.

217.55 Requirements for monitoring and reporting.

217.56 Letters of Authorization.

217.57 Renewals and modifications of Letters of Authorization.

217.58 [Reserved]

217.59 [Reserved]

**Subpart F – Taking Marine Mammals Incidental to Lighthouse Repair and Tour**

**Operations at Northwest Seal Rock, California**

**§ 217.50 Specified activity and specified geographical region.**

(a) Regulations in this subpart apply only to the St. George Reef Lighthouse Preservation Society (Society) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occurs incidental to lighthouse repair and tour operation activities.

(b) The taking of marine mammals by the Society may be authorized in a Letter of Authorization (LOA) only if it occurs within Pacific Ocean waters in the vicinity of Northwest Seal Rock near Crescent City, California.

**§ 217.51 Effective dates.**

Regulations in this subpart are effective from May 15, 2022 through May 14, 2027.

**§ 217.52 Permissible methods of taking.**

Under LOAs issued pursuant to § 216.106 of this chapter and § 217.56, the Holder of the LOA (hereinafter “Society”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.50(b) by Level B harassment associated with lighthouse repair and tour operation activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

**§ 217.53 Prohibitions.**

Except for taking authorized by a LOA issued under §§ 216.106 and 217.56 of this chapter, it shall be unlawful for any person to do any of the following in connection with the activities described in § 217.50:

- (a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under § 216.106 of this chapter and § 217.56;
- (b) Take any marine mammal not specified in such LOAs;
- (c) Take any marine mammal specified in such LOAs in any manner other than as specified; or
- (d) Take a marine mammal specified in such LOAs if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal.

**§ 217.54 Mitigation requirements.**

When conducting the activities identified in § 217.50(a), the mitigation measures contained in any LOA issued under § 216.106 of this chapter and § 217.56 must be implemented. These mitigation measures shall include but are not limited to:

- (a) *General conditions.* (1) A copy of any issued LOA must be in the possession



of the Society, supervisory personnel, pilot, protected species observers (PSOs), and any other relevant designees of the Holder operating under the authority of this LOA at all times that activities subject to this LOA are being conducted.

(2) The Society must conduct training between supervisors and crews and the marine mammal monitoring team and relevant Society staff prior to the start of all trips and when new personnel join the work, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. Visitors to the Station must be instructed to avoid unnecessary noise and not expose themselves visually to pinnipeds around the base of the lighthouse.

(3) All personnel must avoid direct physical interaction with marine mammals during activity. If a marine mammal comes within 10 m of such activity, operations must cease until the animal leaves of its own accord.

(4) Loud outside activity must be halted upon observation on Northwest Seal Rock (NWSR) of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met.

(5) No more than two restoration trips, or 6 days of flight operations, are permitted per month.

(b) *Protocols.* (1) The pilot must ensure that helicopter approach patterns to the NWSR are such that the timing and techniques are least disturbing to marine mammals. To the extent possible, the helicopter must approach NWSR when the tide is too high for marine mammals to haul out on NWSR. The helicopter must avoid rapid and direct approaches to the station by approaching NWSR at a relatively high altitude (*e.g.*, 800-1,000 ft; 244 - 305 m). Before the final approach, the helicopter must circle lower, and approach from an area where the density of pinnipeds is the lowest. If for any safety reasons (*e.g.*, wind conditions or visibility) such helicopter approach and timing

techniques cannot be achieved, the Society must abort the restoration and maintenance session for the day.

(2) Monitoring must be conducted by a trained PSO, who must have no other assigned tasks during monitoring periods. Trained PSOs must be placed at the best vantage point(s) practicable to monitor for marine mammals and implement mitigation procedures when applicable. The Society must adhere to the following additional PSO qualifications:

- (i) Independent PSOs are required;
- (ii) At least one PSO must have prior experience working as an observer;
- (iii) Other observers may substitute education (degree in biological science or related field) or training for experience; and
- (iv) The Society must submit PSO resumes for approval by NMFS prior to beginning any activity subject to these regulations.

(3) The PSO must monitor the project area to the maximum extent possible based on the required monitoring locations and environmental conditions. They must record all observations of marine mammals as described in Section 5 of any LOA, regardless of distance from the activity. A PSO with a high definition camera must be on the first flight to the station each day. For 15 minutes before and after all other takeoffs and landings a PSO must be stationed on the platform of the lantern room gallery, and a PSO must be on the last departing helicopter of the day.

#### **§ 217.55 Requirements for monitoring and reporting.**

(a) PSOs must document any behavioral reactions in concert with distance from any project activity.

(b) *Reporting*—(1) *Reporting frequency*. (i) The Society must submit a quarterly summary report to NMFS not later than 90 days following the end of each work quarter; after the first three quarterly submissions, NMFS will evaluate whether it is appropriate

to modify to annual reports, and modify future LOAs as appropriate to indicate annual reporting requirements if so. The Society must provide a final report within 30 days following resolution of comments on each draft report.

(ii) These reports must contain, at minimum, the following:

(A) Dates and times (begin and end) of all marine mammal monitoring;

(B) Activities occurring during all marine mammal monitoring (*e.g.*, helicopter takeoffs and landings, construction activities);

(C) PSO locations during marine mammal monitoring;

(D) Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;

(E) Upon each flight, the following information: Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; time of sighting; identification of the animal(s) (*e.g.*, genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; distance and bearing of each marine mammal observed relative to the activity for each flight; estimated number of animals (min/max/best estimate); estimated number of animals by cohort (adults, juveniles, neonates, group composition, etc.); and description of any marine mammal behavioral observations (*e.g.*, observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity according to the 3-point scale as defined in the LOA (*e.g.*, no response or changes in behavioral state such as changing direction or flushing);

(F) Number of marine mammals detected, by species; and

(G) Detailed information about any implementation of any mitigation triggered, a description of specific actions that ensued, and resulting changes in behavior of the

animal(s), if any.

(2) The Society must submit a comprehensive summary report to NMFS not later than 90 days following the conclusion of marine mammal monitoring efforts described in this subpart.

(c) *Reporting of injured or dead marine mammals.* (1) In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the LOA-holder must immediately report the incident to the Office of Protected Resources (OPR) (*PR.ITP.MonitoringReports@noaa.gov*), NMFS and to West Coast Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by activities specified at § 217.50, the Society must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of these regulations and LOAs. The LOA-holder must not resume their activities until notified by NMFS. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Condition of the animal(s) (including carcass condition if the animal is dead);

(iv) Observed behaviors of the animal(s), if alive;

(v) If available, photographs or video footage of the animal(s); and

(vi) General circumstances under which the animal was discovered.

(2) [Reserved]

#### **§ 217.56 Letters of Authorization.**

(a) To incidentally take marine mammals pursuant to these regulations, the Society must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time

not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Society may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the Society must apply for and obtain a modification of the LOA as described in § 217.57.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.*, mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within 30 days of a determination.

#### **§ 217.57 Renewals and modifications of Letters of Authorization.**

(a) An LOA issued under § 216.106 of this chapter and § 217.56 for the activity identified in § 217.50(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 and 217.56 of this chapter for the activity identified in § 217.50(a) may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with the Society regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from the Society's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound or disturbance research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) *Emergencies.* If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in

LOAs issued pursuant to § 216.106 of this chapter and § 217.56, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within 30 days of the action.

**§§ 217.58 - 217.59 [Reserved]**

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